

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

NO. 77-4019

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR

THE NATIONAL LABOR RELATIONS BOARD

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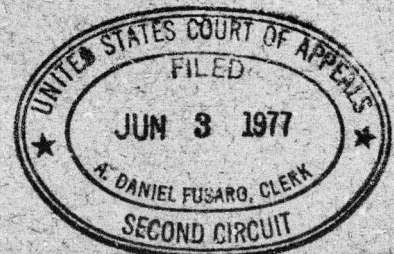
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1. The Union's contention (Br. 11-12) that its tactics did not constitute "restraint" or "coercion" within the meaning of Section 8(b)(1)(B) because it did not engage in acts or threats of violence, intimidation or reprisal is without merit. The presence or threat of force or reprisal is not required by either the statutory language or the legislative history.^{1/} See N.L.R.B. v. Brotherhood of Teamsters, etc., Local No. 70,

^{1/} In the Senate Report No. 105 on S. 1126 in explaining Section 8(b)(1)(B), it was stated:

. . . also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

(footnote cont'd)

459 F.2d 694, 696-697 (C.A. 9, 1972); Waterfront Guard Association, Local 1832, 209 NLRB 513, 86 LRRM 1238, enforced, 508 F.2d 839 (C.A. 4, 1974). See also, General Electric Company v. N.L.R.B., 412 F.2d 512, 516-517 (C.A. 2, 1969).

Indeed, as the Board stated in rejecting a similar union argument, the union's entire course of conduct "reflected a calculated design to go beyond impasse" and force replacement of one employer grievance representative with another, thus violating Section 8(b)(1)(B). See Sheet Metal Workers, Local 59, 227 NLRB No. 90, 94 LRRM 1602, 1605 (1976) (presently pending before the United States Court of Appeals for the Third Circuit, No. 77-1193). There, the union insisted to impasse on a nonmandatory dispute resolution clause which would have forced the employer to submit certain disputes to a panel on which it had no representation. In finding a violation, the Board distinguished between illegal conduct designed to force negotiations to a deadlock in order to effect a change of grievance representative, and mere insistence to impasse on a permissive

(footnote cont'd)

1/ In the Congressional Record of April 23, 1947, page 3953, Senator Taft, in explaining this section, said "... employees cannot say to their employer, 'we do not like Mr. X, We will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.'"

contract term.^{2/} Similarly here, the Board concluded that it was the Union's entire course of conduct which "conveyed a clear message to the Employer to discharge [supervisor] Dazzo" (A. 20). It is the totality of this conduct which makes the Union's actions in this case exceed lawful persuasion and amount to unlawful coercion. Indeed, here, unlike in Local 80, supra, 161 NLRB 229, the Union was not insisting on lawful bargaining matters. On the contrary, what the Union was attempting to bring about--that is, the discharge of the Company's chosen grievance representative--was unlawful, and, therefore, not merely "hard bargaining" as the Union contends (Br. 19).

Moreover, a threat to strike is implicit in the Union's behavior here. Thus, a strike deadline of March 1 had been set; bargaining was at a standstill because the Union was adamant in its wage proposals; and Union Secretary Salvatore admitted that the Union's inflexibility and refusal to make changes in its proposals was because "[Dazzo] is making things tough" (A. 17; 55). As this Court has noted, "[f]or a union to refuse to bargain . . . and yet threaten a strike if bargaining does not succeed is restraint and coercion in both the dictionary and the statutory sense." N.L.R.B. v. Local 294, IBT, 284 F.2d 893, 896 (1960). That the Union here did not, in so many words, threaten to strike is irrelevant, for creating the impression that a strike is imminent is sufficient to constitute coercion. N.L.R.B. v. Silver Bay Local Union No. 962, 498 F.2d 26, 28 (C.A. 9, 1974).

^{2/} Cf. Sheet Metal Workers, Local 80 (Turner-Brooks), 161 NLRB 229 (1966).

In sum, the Union's conduct here amounted to more than insistence or an attempt at persuasion, but instead "involved tactics calculated to circumvent the normal free play of bargaining in order to force [the employer] to abrogate its right to choose its own bargaining [or grievance] representative." Sheet Metal Workers, Local 59, supra, 94 LRRM at 1604-1605.

2. Contrary to the Union's contention (Br. 25-29), the Board has not asked the Court to rely on hearsay evidence in this case, but rather, has simply noted that Dazzo's hearsay testimony is uncontradicted (Board's Brief 10). The substantial evidence in this case on which the Board based its conclusion that the Union coerced the Company in its choice of grievance representative does not include Dazzo's testimony, but, rather, rests on the "extensive pattern of statements and conduct through which [the Union] conveyed" its message to discharge Dazzo. As set forth more fully in the Board's brief, pp. 9-12, this pattern consisted of the statement that Union representatives had "declared war" on Dazzo (A. 20, 42); that the Company was advised that it was Dazzo who was "creating trouble" (A. 20; 45); that Union Secretary Salvatore himself admitted that the Union's inflexibility at the bargaining table was due to Dazzo (A. 17; 55); and that immediately upon Dazzo's discharge, the Union lowered its wage proposals and bargained beyond the March 1 strike deadline even though the contract had not yet been signed (A. 20; 35, 58-59, 131). Thus, Dazzo's testimony that Atherton Sr. had told

him the Union insisted that he be fired is not part of that pattern of conduct and was not relied on by the Board.^{3/}

3. Finally, the Union contends (Br. 30) that the Board's order is overly broad herein in that it prohibits the Union from restraining or coercing "any other employer" in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances (A. 23). This question is not properly before the Court since the Board has not been afforded an opportunity to consider it. Thus, although the Union did not file exceptions herein since the Administrative Law Judge did not find a violation, nevertheless, the Union could have requested the Board to reconsider its remedy. Board Rules and Regulations, Series 8, as amended (29 C.F.R.), Section 102.48(d)(1)^{4/}. Since this contention was

^{3/} Contrary to the Union's contention (Br. 7), the Board's refusal to draw an adverse inference from Atherton, Sr.'s failure to testify is correct, and this Court's decision in N.L.R.B. v. Ford Radio & Mica Corp., 258 F.2d 457 (1958), is inapposite. In Ford Radio & Mica Corp., the Court indicated that an adverse inference might be drawn not from the failure of the General Counsel to call a witness, but from the General Counsel's failure to elicit pertinent testimony from a witness already on the stand. 258 F.2d at 463. In contrast, here Atherton, Sr. was not called as a witness by either side although, as the Board found, he was equally available to both parties. Consequently, as set forth in the Board's brief, p. 10, no adverse inference need be drawn here.

^{4/} 29 C.F.R. Section 102.48(d)(1) provides, in pertinent part: A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on.

not presented to the Board, the Union is precluded by Section 10(e) of the Act from requesting the Court to review that issue at this time. I.L.G.W.U. v. Quality Manufacturing Co., 420 U.S. 276, 281 n. 3 (1975); N.L.R.B. v. Ochoa Fertilizer Corp., 368 U.S. 318, 322 (1961); N.L.R.B. v. Allied Products Corp., 548 F.2d 644, 653 (C.A. 6, 1977).

CONCLUSION

For the reasons stated herein and in our opening brief, we respectfully submit that a judgment should be entered enforcing the Board's order in full.

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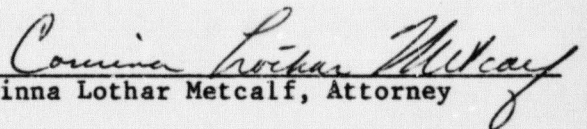
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AEROSPACE AND AGRICULTURAL	)	
IMPLEMENT WORKERS OF AMERICA,	)	
	)	
Respondent.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the Board's reply brief in the above-captioned case have this day been served upon the following counsel at the addresses listed below:

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